No. 96-535

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM 1996

DONALD G. SCHLEY,

Petitioner,

v.

COLLEGE OF CHARLESTON AND MARTIN PERLMUTTER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Is the Fourth Circuit Court of Appeals in conflict with any other court of appeals in terms of an employer's ability to hire the job applicant it finds most qualified based upon lawful job criteria?

2. Should the Supreme Court of the United States specifically define what criteria colleges and universities must use to determine if one applicant for a tenure-track position is better qualified than another?

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STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE BELOW.

Pursuant to Supreme Court Rules 15.1 and 24.2, Respondents College of Charleston and Martin Perlmutter offer their own statement of the case. The Fourth Circuit Court of Appeals affirmed the trial court's judgment in favor of the College of Charleston and Dr. Martin Perlmutter, in his official capacity. In so affirming, the Court of Appeals denied Dr. Schley's contention that the district court erred by denying his motion to amend his complaint and by striking his motion for a jury trial. The Court also denied Dr. Schley's assertion that the magistrate judge who conducted the trial applied an erroneous legal standard when assessing his Title VII claims.

Petitioner moved for rehearing and suggested rehearing en banc. On May 21, 1996, the Fourth Circuit denied the petition for rehearing and declined the suggestions of rehearing en banc. The Court's opinion

is reproduced in the Appendix to the Petition for Certiorari. (A. 1-9.)[1]

The United States District Court for the District of South Carolina entered judgment in favor of Respondents on February 8, 1996. That Order is unpublished but is reproduced in the Appendix to the Petition for Certiorari. (A. 10-31.) Following the entering of judgment for Respondents, Petitioner moved to alter judgment and for a new trial. The trial court denied the motion for a new trial and amended the judgment in part and denied in part with the ultimate judgment in favor of Respondents remaining in tact. This Order is contained in the Appendix to the Petition for Certiorari. (A. 32-37.)

Prior to trial, Respondents filed a Motion for Summary Judgment seeking dismissal as to Dr. Schley's two causes of action, Title VII and Section 1983 on alternative grounds. The United States District Court dismissed Dr. Schley's Section 1983 claim and left in place his Title VII claim. (A. 6.)

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[1] References to the Appendix to the Petition for Writ of Certiorari will be denoted as "A.," followed by the appropriate page number(s).

B. CORRECTION OF MISSTATEMENTS IN THE PETITION.

The opinion of the Court of Appeals correctly sets forth the facts of the case. (A. 1.) The opinion of the trial court also correctly states the facts and in further detail. (A. 10.) In the interest of brevity, Respondents respectfully direct the Court's attention to either of the lower court's opinion.

Pursuant to United States Supreme Court Rule 15.2, Respondents bring the following misstatements of facts contained in the Petition to the Court's attention. Petitioner mischaracterizes the facts of this case by selecting out those few bits that appear to be favorable to him. This selective presentation of facts is deceiving and is not reflective of the totality of the evidence in the case.

Dr. Schley's statement that the prevailing candidate met none of the objective qualifications for the tenure-track position is simply false and flies in the face of the findings of fact by the lower courts. (A. 4, 5, 18-23.) Dr. Frankfurter was qualified not only with regard to the stated criteria but with regard to the more subjective criteria as well. The faculty members clearly

defined the criteria used for all candidates. The facts as asserted by Dr. Schley would require this Court to ignore the actual criteria and apply criteria as defined by Dr. Schley. An expert witness testified at trial as to the comparison of qualifications of Dr. Frankfurter and Dr. Schley, and he reviewed differences in the credentials as well and believed Dr. Frankfurter to be the more qualified candidate.

Dr. Schley incorrectly states as fact that the College imposed upon him a policy that would eliminate any person the Department viewed as likely to proselytize. This statement is against the overwhelming weight of the evidence. While Dr. Schley raised the theory of such a policy, discussion of the policy never went further because the testimony established that no such policy came into play with the individuals participating in the hiring decisions involving Dr. Schley. The individual professors participating in the hiring decision had no concern that Dr. Schley would proselytize in the classroom and, in fact, believed that Dr. Schley was good in the classroom. There was no evidence that any member of the faculty was concerned that Dr. Schley would proselytize. Petitioner quotes

limited portions of Dr. Nunan's testimony out of its full context without indicating that it is a discussion of a year other than that in issue[2] and totally avoids the testimony of the other faculty members and the findings of fact of both the district court and the Court of Appeals.

Dr. Schley also raises the issue of the recommendations made by Drs. Perlmutter and McDaniel that he alter his curriculum vitae. His original curriculum vitae presented included a significant amount of personal (nonacademic) information such as information about his wife's putting him through school, his hiking with his father, and his teaching Sunday school. His close friend on the faculty, Dr. McDaniel, advised Dr. Schley that she felt personal information was not appropriate and suggested he follow the format recommended by the University of Chicago. Dr. Perlmutter, Chair of the Department at the time, recommended that Dr. Schley return to some of the sources of his recommendations and not only request

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[2] Dr. Schley admitted that a more qualified candidate was selected in both the 1988-89 and 1990-91 selection processes.

they be updated but request that some of his former professors strengthen their recommendations. It was this revised curriculum vitae that was presented for consideration in application for the tenure-track position. Several of the faculty members were unaware of Dr. Schley's religious beliefs during the relevant period.

Contrary to what might be assumed from the facts set forth by Petitioner, the friend who sat on the search committee and warned him "not to reveal his political and religious views" did so only because "he had a tendency to get into heated arguments on these subjects." (A. 3, 4.)

Dr. Schley did not receive the tenure-track appointment because, of the over 100 applicants, he was not found to be the most qualified person for the position.

SUMMARY OF THE ARGUMENT

The Petition should be denied because no conflict exists between the courts of appeal in terms of the extent to which speech can be limited to avoid issues of the establishment of religion. Rather than producing conflicting legal analysis, the Fourth Circuit

and the Eighth Circuit reviewed vastly different fact patterns which consequently resulted in different legal results. Accordingly, there is no true conflict, and the Petition should be denied.

The Petition should be denied because there is nothing in either the finding of the trial court or that of the Court of Appeals that suggests tension between the establishment clause and the free exercise clause. Petitioner raised no issues, nor are the facts such that an argument is presented that is sufficient to support a grant of certiorari.

Finally, the Petition should be denied because this Court need not give further direction as to the qualifications for employment or the manner in which they are determined. All three of Petitioner's questions are nothing more than his opinion that the decision below was incorrect and his desire to have this Court review the lower court's application of the law to the facts. This argument is insufficient to support a grant of certiorari.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE NO CONFLICT EXISTS BETWEEN THE CIRCUITS IN TERMS OF THE ESTABLISHMENT CLAUSE ALLOWING GOVERNMENTS TO PERMIT RELIGIOUS ACTIVITIES TO AFFECT AN INDIVIDUAL'S EMPLOYMENT.

Petitioner presents a question that misconstrues the findings of the Fourth Circuit. Petitioner incorrectly asserts that the Department had an "admitted" policy of screening out applicants who might be inclined to proselytize. The concurrent findings of the trial court and Court of Appeals were that no such policy was involved in the facts leading to the College's determination not to hire Dr. Schley. (A. 6, 16, 17.) This finding is well supported by the evidence. The district court found that "[p]rofessor by professor, the testimony was without exception that there was never any concern that Dr. Schley would use his classroom to proselytize. In fact, each individual spoke favorably of Dr. Schley's time in the classroom." (A. 16.) Specifically as to the testimony of Dr. Nunan upon which Petitioner relies, the district court found "[t]his

discussion by Dr. Nunan is, however, of little consequence to this action because Dr. Nunan testified that there were no such concerns with Dr. Schley. This testimony is not contradicted by any other witnesses." (A. 17.)

Without so noting, Petitioner's argument would require this Court to conclude that facts as found by the lower courts were in error. This case does not, however, present an instance in which the concurrent findings of fact should be reviewed. Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949). There was no policy of automatic elimination nor was there one that effected Dr. Schley.

When viewed in light of the facts as found by the courts below rather than the highly selective facts as asserted by Dr. Schley, there is no issue that Dr. Schley might proselytize or that the College limited his free exercise of religion. Without such there can be no conflict between the circuits because the difference in the cases lies not in the application of the law but in the vastly different factual scenarios. Therefore, the Petition should not be granted because this Court does not grant certiorari to review evidence and discuss

specific facts. United States v. Johnston, 268 U.S. 220, 227 (1925).

When comparing the circuit decisions raised in issue by Petitioner, the significant distinction in facts is manifest. In Brown v. Polk County, 61 F.3d 650 (8th Cir. 1995), cert. denied, 116 S. Ct. 1042 (1996), there was activity by Mr. Brown that could be construed to be of a religious nature, and the governmental agency admittedly took action against Mr. Brown based on that activity. Mr. Brown, director of the county's information services department, was reprimanded for his religious activities and was directed to "cease any activities that could be considered to be religious proselytizing, witnessing and counseling . . . ." 61 F.3d at 652. Mr. Brown was later terminated, and the county administrator admitted that his reprimand for "religious activity" was a factor in the decision to terminate Mr. Brown. 61 F.3d at 654. The Eighth Circuit conceded that the county had a legal right to ensure that the workplace was free from religious activity that harasses or intimidates, but that the order issued in the administrator's discipline ran afoul of the Constitution. The court reasoned that the limitations placed on Mr.

Brown's speech were improper because they were not narrowly tailored to the aim of prohibiting harassment. 61 F.3d at 658.

Dr. Schley never engaged in any religious activity that was of concern to the Department and was never subjected to prohibitions of religious activity as was Mr. Brown. Contrary to Dr. Schley's argument, the courts below did not find that Dr. Schley was eliminated from the hiring selection process because the faculty members believed he would proselytize or carry on religious activity of any nature. In fact, the courts found that there was no concern that he would proselytize and that he was considered a candidate well into the selection process. It is, therefore, not a conflict of the application of law that results in a different result in the holdings of the Fourth Circuit and the Eighth Circuit, but a critical difference in the underlying facts. One has no basis for arguing what the holding of the Fourth Circuit would mean in a situation presenting facts such as those in Brown because the restrictions found to be so offensive by the Eighth Circuit are not present in Dr. Schley's case.

The first question as presented by Petitioner is nothing more than his opinion that the decision below was incorrect. No direct conflict among the courts of appeal nor any conflict between this Court and a court of appeal is presented; no unsettled question of federal law is presented. Therefore, the Petition should be denied.

II. THIS CASE PRESENTS NO ISSUE DEMONSTRATING A TENSION BETWEEN THE ESTABLISHMENT CLAUSE AND THE FREE EXERCISE CLAUSE AND DOES NOT PRESENT A QUESTION TO BE SETTLED BY THIS COURT.

This case does not present an appropriate instance for the Court's review of the relationship between the establishment clause and the free exercise clause of the First Amendment. This is not a case in which a governmental entity either favored a religious person or a person without religion. This is not a case with facts that would raise a discussion of whether there is a tension between the establishment clause and the free exercise clause or whether they are, in fact, complementary. What Petitioner presents is a wholly academic consideration and not one raised by the facts

or the legal holdings of this case. Review is unwarranted at present because it is not "beyond the academic or the episodic." Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955). The Petition should, therefore, be denied.

III. THE PETITION SHOULD BE DENIED BECAUSE THIS COURT SHOULD NOT DICTATE THE SPECIFIC QUALIFICATIONS FOR INDIVIDUAL POSITIONS.

Dr. Frankfurter, the candidate who was ultimately chosen to fill the tenure-track position, was well qualified for the entry-level teaching position. The Court of Appeals found that "[t]he witnesses testified why they believed the successful candidates' credentials were superior to those of Dr. Schley. The testimony showed no taint of discrimination, and the magistrate judge's acceptance of their explanations is amply supported by the evidence." (A. 8.)

Petitioner is now asking this Court to reject the findings of the courts below and to accept his weighting of the evidence instead. Petitioner is, in asking the question of weighting evidence in a broader sense, asking this Court to become a manager of human

resources and police the required qualifications for every job.

What Petitioner is asking of this Court is not only to declare which qualifications must be given the most weight, but also to define for employer the way they may apply those qualifications. For instance, the uncontradicted testimony was that the Department historically considered candidates who were "all but dissertation" at the time of application and offer to meet the qualification of "Ph.D. required."[3] This was in no way limited to either Dr. Frankfurter or to this one instance of hiring. Yet, Petitioner now asks this Court to redefine that qualification, that is, to find that the College could not consider a candidate who is ABD at the time of application, despite the fact that both the trial court and the Fourth Circuit found the Department to have supported its use.

This Court has found that an "employer has discretion to choose among equally qualified candidates, provided that decision is not based on unlawful criteria." Texas Dep't of Community Affairs v. Burdine, 450 U.S.

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[3] A Ph.D. is required, however, at time of appointment, that is, at the time the job begins.

248, 259, 101 S. Ct. 1089, 1096 (1981) (Title VII case which recognizes an employer's traditional management prerogative). This same reasoning was applied in an academic setting by the Fourth Circuit in Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980), where the court noted that

> [u]nsure how to evaluate the requirements for appointment . . . and reluctant to interfere with the subjective scholarly judgment as to whether the aggrieved academician should be awarded the desired appointment . . . . Rather the court's review has been narrowly directed as to whether the appointment . . . was denied because of a discriminatory reason.

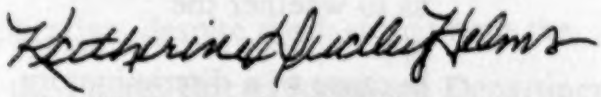
632 F.2d at 345-346 (citations and footnotes omitted). Petitioner phrases the question as one seeking definition of which criteria a court will use in reviewing qualification, when the true issue is one of grossly limiting the criteria used by the employer. Both lower courts found in Dr. Schley's case that the criteria was

nondiscriminatory and the reasoning of the Department was amply supported. (A. 8, 28.) There is nothing in this matter that suggests the Court should exercise what is normally the employer's management prerogative in making an employment decision. The Petition should be denied.

CONCLUSION

The College of Charleston and Dr. Perlmutter pray that this Court deny the Petition for Writ of Certiorari because the cause presents no issue appropriate for the Court's review and because the lower court's analysis was not in error.

Respectfully submitted,



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